Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-4201

RALPH RUSSO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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No.

RALPH RUSSO,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Ralph Russo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 23, 1976.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (pages 15-21).

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on August 23, 1976. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

(1) Whether in the circumstances of this case, either due process or the Court's supervisory powers bar conviction for trafficking in contraband supplied by a government informant?

(2) Whether petitioner was denied a fair trial in violation of his Fifth Amendment rights where he was denied access to the government's informant and precluded from questioning the undercover agent with respect to the informant's involvement?

Constitutional Provision Involved.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

The instant case arises out of a one-count indictment returned December 5, 1974, charging that the petitioner, Ralph Russo, on November 25, 1974, knowingly sold, transferred, and delivered false and counterfeit United States obligations in the form of forty-four $100,000 Treasury bills, with the intent that they be passed, published and used as genuine, in violation of 18 U.S.C. § 473.

The case was tried before a jury on August 15-19, 1975. The evidence indicated that, on August 9, 1974, the petitioner had been introduced to Secret Service Agent Guy Caputo, then acting in an undercover capacity and going by the name of Guy Marino (Tr. 56, 212-213), by a business associate of the petitioner, one Clifford John Ellsworth (Tr. 114). It appeared at trial that Ellsworth, unbeknownst to the petitioner, had at

that time been an informant for the government. Between August and October, 1974, the petitioner was contacted a number of times by Caputo, who sought to obtain various counterfeit securities from the petitioner (Tr. 56-57, 216). Caputo's purported intent was to use the counterfeit securities in conjunction with his fictitious partner, a bank vice-president, as collateral for a phony loan, withdrawing the securities from the bank before their maturation date so as to avoid discovery of the fraud (Tr. 45, 131-133). Each time, the petitioner responded that he could not obtain the materials requested by Caputo (Tr. 217).

The petitioner testified that, in October, 1974, he was contacted by Ellsworth, whom he knew to be involved in a variety of profitable business ventures, and told to represent to Caputo that the counterfeit Treasury bills he had requested could be supplied (Tr. 215-220). The petitioner testified that Ellsworth's scheme was to pass securities in fact taken from Ellsworth's mother to Caputo as counterfeit (Tr. 215-227). After Caputo had withdrawn the securities, Ellsworth could return them to his mother's safety deposit box (Tr. 223). In the end, then, Caputo and his fictional banker-partner would be richer for having defrauded the bank in a phony loan transaction; while, unbeknownst to Caputo, Ellsworth and the petitioner would be richer for having conned Caputo with fake "counterfeit" securities.

After a series of telephone calls to the petitioner, selectively recorded by Caputo, arrangements were made for the delivery of a "sample" bill at Logan Airport on November 22, 1974 (Tr. 38-42). The petitioner testified that earlier that same day Ellsworth sent a newspaper containing the "counterfeit" security to the petitioner for delivery to Caputo (Tr. 219).

On November 23, 1974, Caputo again called the petitioner to arrange for delivery of the remaining 49 Treasury bills (Tr. 51-52). The petitioner testified that Ellsworth again sent him

the contraband the night before the delivery was to occur (Tr. 221-227). The delivery took place at 3:30 on November 25, 1974, at Logan Airport (Tr. 54-55). In fact, only 44 securities were received by the agents (Tr. 160). The petitioner was thereupon arrested for the offense charged (Tr. 163).

The petitioner had filed a pre-trial motion calling for disclosure of informants' identities. That motion was denied. At trial, stating that Ellsworth was known to the petitioner to be the informer, defense counsel requested his production (Tr. 102), and attempted repeatedly to cross-examine Caputo concerning Ellsworth's participation. The government's objections to this line of questioning were sustained. After the defendant had testified on his own behalf and had called Ellsworth as a witness, the government informed the court that Ellsworth recently had been injured and was unable to appear (Tr. 268). Defense counsel thereupon requested leave to depose Ellsworth, stating that, since every attempt to examine the agent as to his involvement had been foreclosed by the court and since only Ellsworth could testify as to his role in the scheme, his testimony was critical to the defense (Tr. 269-272). The trial judge, ruling that the petitioner's story was inherently incredible, denied the motion (Tr. 275).

On August 19, 1975, the petitioner was found guilty and sentenced to ten years' imprisonment. Although he was continued on bail pending disposition, the petitioner's motion for bail pending appeal was denied.

On August 23, 1976, the judgment of the District Court was affirmed by the Court of Appeals for the First Circuit. Relying on *Hampton* v. *United States*, U.S. , 96 S. Ct. 1646 (1976), the Circuit Court concluded that, based on trial counsel's "less than diligent" efforts to locate Ellsworth or elicit testimony from Caputo, and in light of petitioner's conceded readiness "to join a scheme to 'flim-flam' Marino," a crime

with which he was not charged, "it was not unfair to prosecute this case" (App. 18).

The court proceeded to find no error in denying petitioner a continuance during which to take Ellsworth's deposition, once his location had been disclosed to the trial court, on the ground that he had failed to provide corroboration, through Caputo, of what the court felt to be an "extreme[ly] incredib[le]" story (App. 20). At the same time, the trial court's refusal to permit cross-examination of Caputo was upheld as being a proper application of the Rules of Evidence. The combined effect of these two rulings by the trial court, which was to foreclose access to the only two sources of corroborative evidence available to the petitioner, was totally ignored by the Court of Appeals. (See App. at 20-21.)

Reasons for Granting this Writ.

I. The Decision Below Presents a Question of Constitutional Law Not Yet Definitively Settled by this Court.

In *Hampton* v. *United States*, *supra*, the Court was presented with the question of whether government supply of contraband to the defendant constituted a per se bar to his prosecution. Three justices agreed that, if predisposition were found, government involvement could not violate the defendant's due process rights. Five justices, however, refused to adopt this position in all cases, leaving open once again the question unanswered in *United States* v. *Russell*, 411 U.S. 423 (1973): under what circumstances, if any, will government procurement of a crime by supplying the contraband itself be a bar to prosecution?

This question of impermissible government involvement is now squarely before the Court. Caputo's testimony, while it established that the petitioner purported to be negotiating a transaction for counterfeit securities, did not contradict the petitioner's story of Ellsworth's involvement. While the government represented to the court in a bench conference that it had not provided Ellsworth with contraband to pass to the petitioner, it did not deny either knowledge of Ellsworth's participation or that he had in fact supplied the contraband from his own sources (Tr. 99-101). Moreover, curious omissions in the government's case tended further to indicate the government's knowledge of Ellsworth's role. These omissions included the selective recording of telephone conversations, the failure to record actual meetings, the failure to run a comparison of Ellsworth's fingerprints with latent prints (none of which proved to be the petitioner's) found on the contraband, and failure to conduct surveillance of either Ellsworth or the petitioner prior to the November 22 and November 25 meetings between the petitioner and the agents. Thus, the instant case differs in several respects from either *Russell*, *supra*, or *Hampton*, *supra*. Unlike *Russell*, *supra*, there was in the instant case no evidence of an on-going criminal enterprise infiltrated by government operatives. Unlike *Hampton*, *supra*, where the testimony of the informant not only contradicted the defendant's story but also showed the defendant to have been the moving force in the criminal enterprise, there was no evidence in the instant case which conflicted with petitioner's account of being solicited by Caputo, set up and supplied by Ellsworth and duped into acting as a conduit of contraband from one government operative to another. In such circumstances, prosecution for a crime which could not have occurred without governmental participation must be held to exceed the bounds of fair play.

Great uncertainty has been demonstrated in the lower courts in the aftermath of *Russell, supra. Contrast, e.g., United States* v. *Oquendo*, 490 F. 2d 161 (5th Cir. 1974); *United States* v. *West*, 511 F. 2d 1083 (3d Cir. 1975); *United States* v. *Spivey*, 508 F. 2d 146 (10th Cir. 1975), cert. den. 421 U.S. 949 (1975) (applying this approach but finding it unmet); *and United States* v. *McGrath*, 468 F. 2d 1027 (7th Cir. 1972), vac. and rem. 412 U.S. 936 (1973), reh. den. 414 U.S. 883 (1973), aff'd, 494 F. 2d 562 (7th Cir. 1974). That uncertainty was in no way ameliorated by the Court's decision in *Hampton, supra*. Because of the importance of the matter at issue, it is submitted that certiorari should be granted in the instant case to resolve the issue.

II. The Decision Below Raises a Question of Trial Procedure of Constitutional Dimension Mandating Review by this Court.

The two primary defenses raised at trial were excessive government involvement and lack of intent. With respect to both issues, the role of John Ellsworth was of critical importance. Two avenues, apart from his own testimony, were open to the petitioner as means of presenting that role to the jury: Caputo and Ellsworth. Yet the petitioner's attempts to elicit evidence from these sources were blocked by the trial court, which was upheld on appeal.

On cross-examination of Agent Caputo, after eliciting the fact that Ellsworth had introduced the petitioner to him, counsel attempted repeatedly to probe Ellsworth's relationship to the agent and the agent's knowledge of the informer's activities. The questions involved were: how long had you known Ellsworth (Tr. 114), how did you come to meet him (Tr. 114), who introduced you to him (Tr. 114), how many times between October 15 and November 25 did you meet or talk with Ellsworth (Tr. 116), was Ellsworth working with you (Tr. 121), what was Ellsworth's involvement (Tr. 135), what was the involvement of three others named in a government report as suspects (Tr. 135), had not Ellsworth been arrested by you before (Tr. 142), was Manny Kassolakis (one of the three named) involved with Ellsworth (Tr. 143), do you know where Kassolakis was on November 24 or November 25 (Tr. 143)? As to each of these questions the government's objection was sustained. From discussions at the bench, it was clear that it was the substance of the questions and not their timing which provided the basis for the judge's rulings.

With respect to the informant Ellsworth, both prior to and during trial, the petitioner sought the court's assistance in compelling the production of Ellsworth. Despite petitioner's attempts to cross-examine Caputo, the government argued, and the court apparently agreed, that, in the absence of some corroboration of the petitioner's testimony, it was under no obligation to produce its informant. After the petitioner had testified on his own behalf, the government disclosed to the court that Ellsworth had been injured and was unable to travel (Tr. 268). In response to the petitioner's request for leave to take Ellsworth's deposition, the government again disclaimed any obligation to produce the informant (Tr. 270), pointing once again to the lack of corroboration and the fact that Ellsworth had not been present at the actual sale (Tr. 274). The court ruled that since it found "the testimony of Mr. Russo to be inherently incredible and inherently improbable [there was] no burden on the Government to produce the informant" (Tr. 275). Defense counsel objected to this ruling (Tr. 275).

Whatever the scope of the government's obligation to produce informants, and this was clearly not a case in which anonymity was at stake, *see Roviaro* v. *United States*, 353

U.S. 53 (1957), justice clearly required production of the informant in the form of his testimony under oath in the instant case. The petitioner's account of the informant as prime mover and supplier, uncontradicted by the government's witnesses, established a degree of participation and knowledge on Ellsworth's part which guaranteed that his testimony would be, not just material, but determinative of both the entrapment defense and the question of knowledge and intent. Moreover, as noted above, since cross-examination of Caputo had already been prohibited, Ellsworth's testimony became critical.

The petitioner thus found himself locked into an impossible position. On the one hand, his defenses of government involvement and lack of intent depended upon corroboration of the Ellsworth story, while, on the other, he had been precluded from obtaining that corroboration from the only possible sources, Caputo and Ellsworth. The effect of the court's rulings was thus to deprive the petitioner of his constitutionally guaranteed right to a fair trial. In these circumstances, reversal was required. The Court of Appeals' action in upholding the trial court's rulings, based as it was on an overly rigid application of procedural rules, utterly ignored the damage done to the petitioner's defense. This blatant violation of due process principles demands review by this Court.

Conclusion.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Appendix.

United States Court of Appeals for the First Circuit.

No. 75-1362.

UNITED STATES OF AMERICA,
APPELLEE,

v.

RALPH RUSSO,
DEFENDANT, APPELLANT.

Judgment

Entered August 23, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

United States Court of Appeals
For the First Circuit

No. 75-1362

UNITED STATES OF AMERICA,

APPELLEE,

v.

RALPH RUSSO,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. MALCOLM M. LUCAS*, *U. S. District Judge*]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

George F. Gormley and *Judith E. Diamond*, with whom *Harrington and Gormley* was on brief, for appellant.

William C. Brown, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, and *Mervyn Hamburg*, Attorney, Department of Justice, were on brief, for appellee.

August 23, 1976

COFFIN, *Chief Judge*. Appellant was convicted by a jury of selling, transferring and delivering 44 counterfeit $100,000 United States Treasury bills, in violation of 18 U.S.C. § 473.

A Secret Service agent testified that, having assumed the name Marino, he was introduced to appellant in August, 1974. The agent testified that over a period of several months he sought counterfeit Treasury bills from appellant, telling him that they were to be used as collateral for a bank

* Of the Central District of California, sitting by designation.

loan, the intent being to withdraw them prior to their maturity date so that the fraud would never be discovered. In a series of phone calls between the agent and appellant, a deal seemed close in October, 1974, but failed to materialize. In November, however, appellant contacted the agent, a meeting was arranged, and appellant provided the agent with a sample bill. This being pronounced satisfactory, further calls were made to set up the transfer of the rest. A second agent went to pick those up; he testified to arresting appellant after that transfer took place. Photos of the delivery and arrest were introduced. A number of the October and November telephone calls which had been recorded by the Secret Service agent were played to the jury. Taken at face value, these tapes showed the negotiations for the sale, culminating in an agreement (with a price of nine per cent of face value), as well as considerable knowledge of the field on appellant's part. A government expert testified to the counterfeit nature of the bills.

Appellant took the stand and admitted the substance of the facts related by the agents, including the accuracy of the taped telephone conversations. He presented a defense of lack of intent, claiming that John Ellsworth, who had introduced him to the Secret Service agent (as Marino) in August, had put him up to a scheme to defraud Marino by selling him real $100,000 Treasury bills and pretending they were fakes. Thus, appellant testified, he thought the bills were genuine. Appellant explained the phone conversations and his other statements to Marino as part of Ellsworth's scheme to defraud Marino into thinking the bills were counterfeit.[1] Moreover, appellant charged that Ellsworth was

[1] It might seem to be the reverse of fraud to sell $4,400,000 worth of real Treasury bills to someone for $396,000. (Apparently the going rate even for stolen Treasury bills is considerably higher than for counterfeiting.) However, appellant testified that Ellsworth told him that he would spirit the bills out of his mother's safe-deposit box and, despite the "sale" to Marino, ultimately return them after Marino, having used them to procure the loan, had withdrawn them; thus the $396,000 would be just for the temporary use of the bills. The tapes, however, contained no mention of any arrangement for the ultimate return of the bills, even though the terms of the deal were otherwise worked out in considerable detail. If this account leaves something to be desired, we nevertheless think it reflects the testimony. Appellant added only that he suspected there was something "shady" about the transaction, which he variously described as a "flim-flam" of Marino and as somehow being in aid of a "$55-million international cement transaction".

a government informant who, by supplying him with the contraband, had made him a conduit in a sale from the government to the government.

The issue of entrapment was presented to the jury under instructions which reflected the teaching of *United States* v. *Jett*, 491 F.2d 1078 (1st Cir. 1974), that evidence of inducement can be disbelieved or that the government's burden on predisposition can be satisfied without independent evidence. The jury's finding against appellant on this score was more than justified in light of the ease with which he had managed the transactions, his obvious knowledge of the ins and outs of counterfeiting, the implausibility of the story which he professed to believe, and especially the absence of any evidence of unreadiness. *See Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1970). Indeed, appellant did not in fact present a defense of entrapment: he testified not that he was corrupted into selling counterfeit bills, but that he did not (through lack of intent) commit that crime at all.[2]

The major argument on appeal is that fundamental fairness should bar appellant's prosecution as the conduit in a government-to-government sale. This contention falls under the intervening decision in *Hampton* v. *United States*, No. 74-5882 (Supreme Court, April 27, 1976). Justice Powell's determinative opinion in that case reaffirms the ruling in *United States* v. *Russell*, 411 U.S. 423 (1973), that the defense of entrapment is focused on predisposition. More-

[2] The instructions were proposed by the government prior to trial, apparently in response to an indication at the pre-trial conference that an entrapment defense would be raised.

over, while refusing to go so far as the *Hampton* plurality in ruling out a fundamental fairness argument in an outrageous case regardless of predisposition, Justice Powell agreed with the plurality that a government-to-government sale with the defendant as conduit did not per se require reversal. Nor can we say that there was any outrageous police conduct in this case. The government made an offer of proof that the informant was in fact merely an introductory device, and that the actual supplier was a real counterfeiter who had subsequently been arrested and charged in another indictment. Appellant's story was implausible at best; he was less than diligent in searching out the one person (Ellsworth) who could have completely corroborated it (if it was true); and he failed to call the agent (Marino) who could have testified concerning government knowledge of Ellsworth's activities.[3] *Cf. Jett, supra,* 491 F.2d at 1081. Moreover, by appellant's own account he needed no persuasion to join a scheme to "flim-flam" Marino for some $400,000. We are convinced that it was not unfair to prosecute this case.

Appellant also objects to the trial court's failure to grant a continuance (after all the testimony had been heard) to allow a deposition of Ellsworth. The objection trips on defendant's own inaction. If indeed Ellsworth told appellant the bills were real, Ellsworth's crucial role in appellant's defense must have been known from the arrest and indictment eight or nine months prior to trial. Ellsworth was a business associate of appellant's and well known to him. Appellant had Ellsworth's address and phone number, and

[3] Objection is made to the trial judge's restriction of cross-examination of the agent about Ellsworth's role. But the subject was not part of the government's case and was outside the scope of proper cross-examination. F. R. Evid., Rule 611(b). Indeed, during the bench conference defense counsel admitted that the attempt was "premature". *United States* v. *Ramirez*, 533 F.2d 138, 141 (5th Cir. 1976).

the government asserted that Ellsworth had not been and was not currently in hiding. The defense stated vaguely that it tried to get in touch with Ellsworth about two months prior to the August, 1975, trial, but there is no indication of diligence. At no time did appellant attempt to subpoena Ellsworth.

The fact that Ellsworth may have been an informant does not help appellant here. The government asserted that the informant was only an introductory device; even by appellant's version he did not witness or participate in the actual crime. The government had no reason to expect even a burden of disclosure under *Rovario* v. *United States*, 353 U.S. 53 (1957). *See United States* v. *Skeens*, 449 F.2d 1066, 1071 (D.C. Cir. 1971); *Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966). Less than two weeks prior to trial appellant filed a conclusory boilerplate motion for disclosure, but the motion did not refer to any facts of the case at hand, and it was properly denied.[4] Appellant could gain nothing from this pro forma request; some specific indication of need is required. *See United States* v. *Alvarez*, 469 F.2d 1065 (9th Cir. 1972). Nor does it appear that the supposed entrapment defense (which failed to materialize) was raised prior to trial with any specificity. *See United States* v. *Mehciz*, 437 F.2d 145 (9th Cir. 1971).

Appellant appears to argue that his mid-trial request put a burden of production on the government, the necessity for a continuance being *a fortiori* when it turned out Ellsworth was incapacitated.[5] But there is no absolute rule of

[4] The motion also was internally inconsistent, stating generally that disclosure was necessary since the informant could testify as to the defendant's state of mind and also could throw doubt on the identity of the defendant. We note that the latter assertion, among others in the motion, was directly contradicted by appellant's later testimony.

[5] At the end of the first day of the two-day trial, a Friday, the defense stated that it knew Ellsworth must be an informant and requested his production.

production. *United States* v. *Davila Williams*, 496 F.2d 378, 383 (1st Cir. 1974). Here, there was no indication that appellant, with some diligence, could not have located Ellsworth in advance of trial, either with the information available to him or by subpoena. And Ellsworth's unavailability cannot be attributed to a failure of reasonable diligence or cooperation on the government's part.[6] Finally, the court could properly consider the extreme incredibility of appellant's story, his failure to call the Secret Service agent for partial corroboration, and the government's contrary offer of proof. It was not error to deny the continuance. *See also United States* v. *Enrique Diaz*, No. 74-1427 (1st Cir., May 5, 1976).

Appellant's next point is that because Marino was aware that he was buying counterfeit bills, there was no evidence in support of the statutory requirement of "intent that the same be passed, published, or used as true and genuine." This argument overlooks the fact, reflected in the taped phone calls and admitted by appellant, that Marino told appellant he was going to use the fake bills as collateral for a bank loan. The further twist that this transaction purportedly was going to be accomplished with the connivance of one of the officers of the bank does not negate the fact

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The trial judge took the matter under advisement and suggested the government contact Ellsworth over the weekend in case of an adverse ruling. After appellant testified on Monday, the defense called Ellsworth in open court. In a bench conference, the government stated that it had located Ellsworth, confined with a slipped disc and under doctor's orders not to travel for at least two weeks. At that point the defense request for a continuance in order to take a deposition was made and denied, the court noting that it found appellant's story inherently incredible.

[6] *See United States* v. *Super*, 492 F.2d 319 (2d Cir. 1974); *United States* v. *Fallings*, 482 F.2d 1352 (5th Cir. 1973); *United States* v. *Weinberg*, 478 F.2d 1351 (3d Cir. 1973); *United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972); *United States* v. *Prada*, 451 F.2d 1319 (2d Cir. 1971); *United States* v. *Escobedo*, 430 F.2d 603 (7th Cir. 1970); *United States* v. *Glass*, 371 F.2d 418 (7th Cir. 1966); *Velarde-Villareal* v. *United States*, 354 F.2d 9 (9th Cir. 1965). Nor, under the circumstances, can we say that the government had any duty to ascertain Ellsworth's availability in advance of trial. *Compare United States* v. *Jones*, 492 F.2d 239 (3d Cir. 1974).

that Marino's stated purpose was to use them as genuine vis-a-vis the bank itself. There is no requirement under § 473 that it be the immediate purchaser who is defrauded. *Hart* v. *United States*, 396 F.2d 243 (8th Cir. 1968).

Finally, appellant objects to the impeachment of his credibility on cross-examination through evidence of a 1966 manslaughter conviction and a 1970 arson conviction. Appellant's credibility was a significant issue in the trial, there was a proper limiting instruction, and the court determined that the probative value of the evidence outweighed its prejudicial effect. F. R. Evid., Rule 609(a). There was no abuse of discretion.

Affirmed.